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NO. 82-586

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAWAIIAN AIRLINES, INC.,
Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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HAWAIIAN AIRLINES, INC. ("Appellant")[1] submits this brief opposing the Motion to Dismiss or Affirm filed by the Director of Taxation of the State of Hawaii ("Appellee") dated November 25, 1982, and received by Appellant on November 30, 1982.

Appellee's Motion to Dismiss or Affirm ("Motion") includes a statement of the question presented and seven contentions. The statement of the question presented and five of the contentions are based on a misconstruction of 49 U.S.C. § 1513(b). The remaining two contentions are based on Com-

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[1] Appellant has no parent or affiliate companies. Appellant has no subsidiary companies other than wholly-owned subsidiaries.

merce Clause authorities which are not pertinent to the issue herein.

1. APPELLEE'S STATEMENT OF THE QUESTION PRESENTED AND FIRST CONTENTION—Plain Meaning of the Federal Statute.

Appellee states that the question herein is whether the Hawaii public service company tax ("PSC tax") "is a property tax or a gross receipts tax." Motion 1. This fails to recognize that all property taxes are not permitted by Subsection (b) of 49 U.S.C. § 1513 ("Subsection (b)"). 49 U.S.C. § 1513 provides, in applicable part, as follows:

> § 1513. *State Taxation of Air Commerce*
>
> *Prohibition; Exemption*
>
> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> *Permissable State Taxes and Fees*
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . . (Emphasis added.)

The plain meaning of Subsection (b), as set forth above, is that only property taxes which are not "otherwise enumerated in subsection (a)" are permitted. The PSC tax is enumerated in, and prohibited by, Subsection (a) of 49 U.S.C. § 1513 ("Subsection (a)") and, therefore, not permitted by Subsection (b).

Appellee's first contention is that Appellant has no right to appeal because the PSC tax is "expressly permitted by federal statute." Motion 2-3. This contention disregards the phrase

"other than enumerated in subsection (a) of this section" in Subsection (b). The plain meaning of this phrase in its statutory context is that Subsection (b) only permits taxes not otherwise enumerated in Subsection (a). Since the PSC tax is enumerated in Subsection (a), it is not permitted by Subsection (b).

2. APPELLEE'S SECOND CONTENTION—No Federal Question.

Appellee's second contention is that there is no federal question herein because this case "does not involve the interpretation or application of a federal statute." Motion 3. Appellee's disregard of the plain meaning of Subsection (b) in the motion demonstrates that the only issue herein is the meaning of the subject federal statute.

3. APPELLEE'S THIRD CONTENTION—State Law Question.

Appellee's third contention is that the question presented is a state law question (i.e., whether the PSC tax is levied on property or on gross receipts). Motion 4. As indicated, any resolution of this state law question is irrelevant because property taxes which are enumerated in Subsection (a) are prohibited, even if they are property taxes for state law purposes. Notably, and perhaps for this reason, this state law question was not reached by the Hawaii Supreme Court, which based its decision on an analysis of the federal statute.[2]

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[2]The Hawaii Supreme Court did not reach the question whether the PSC tax is a property tax perhaps because there is no basis for concluding that the PSC tax is a property tax. The PSC tax law states that the PSC tax is "of three per cent of" an airline's gross income, that the PSC tax is "in lieu of" the Hawaii general excise tax, a business privilege tax, and "not in lieu of any other tax," and that the PSC tax is "a means of taxing" personal property. Haw. Rev. Stat. § 239-6 (1976). The PSC tax returns promulgated by Appellee provide Appellee with information as to an airline's gross income, but provide no information as to an airline's personal or real property or even as to whether an airline has any personal or real property. Stipulation of Facts in the Hawaii Tax Appeal Court ¶¶8-10, Exhibits D-E.

4. APPELLEE'S FOURTH AND FIFTH CONTENTIONS—Commerce Clause Precedents.

Appellee's fourth and fifth contentions are based on authorities considering whether state taxes are prohibited by the Commerce Clause of the United States Constitution. Although Appellant's operation has a substantial interstate character (Jurisdictional Statement 3), Appellant does not contend that the PSC tax is void under the Commerce Clause. Appellee's Commerce Clause cases and analysis are, therefore, not pertinent to the issue herein. The rejection of magic label analyses by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) does, however, vitiate Appellee's position that the PSC tax escapes prohibition under 49 U.S.C. § 1513 by reason of its labeling as "a means of taxing" personal property. Motion 4; Haw. Rev. Stat. § 239-6 (1976).

5. APPELLEE'S SIXTH CONTENTION—Congressional Intent.

Appellee's Sixth Contention is that Congress did not intend that 49 U.S.C. § 1513 be applied to the PSC tax. Motion 9. This is contrary to the plain meaning and legislative history of 49 U.S.C. § 1513. Jurisdictional Statement 13-17. *See State v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (Ariz. App. 1980). In fact, an Ohio tax on intrastate airline gross receipts was considered at least twice by Congressional subcommittees in connection with the enactment of 49 U.S.C. § 1513, once prior to the addition of the statutory language prohibiting taxes on gross receipts and a second time on a request by the State of Ohio, Deputy Tax Commissioner, for the addition of a specific statutory exemption for gross receipt taxes fairly apportioned to a State, which request was rejected. *See Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 92d

Cong., 2d Sess. 137 (1972) (Statement of Whitney Gillilland); *Hearings before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 248-49 (1973). Appellee also alleges that the multiple tax burdens that concerned Congress in its enactment of 49 U.S.C. § 1513 are not present herein. Congress' concern, in part, was that both federal and state taxes were being imposed on the same airline gross receipts. Jurisdictional Statement 8. This is the precise situation involved in the instant case.

6. APPELLEE'S SEVENTH CONTENTION—TEFRA.

Appellee's seventh contention is that the amendment of 49 U.S.C. § 1513 by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") makes the instant case moot. Section 532 of TEFRA adds additional classes of taxes which are prohibited by 49 U.S.C. § 1513 and does nothing to change the fact that Subsection (b) only permits property taxes "other than those enumerated in subsection (a)." Jurisdictional Statement 10-11 and n. 12. Further, Section 532 of TEFRA has no application to the tax years involved in this case.

CONCLUSION

Appellee's Motion should be denied.

Respectfully submitted,

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December 1982

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